83-636

Office Supreme Court, U.S.
FILED
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DAVID BATTISTI,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTION PRESENTED

I. Is evidence lacking to establish a violation of 18 U.S.C. §§1084, 1952 and 1955, where the indictment charges a "sports bookmaking" operation as a factual predicate, when the proofs establish only that the accused acted as a bettor?

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NO. _____

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OCTOBER TERM, 1983

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner seeks a writ of certiorari to review the judgment of this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

In the United States District Court, although no opinion was filed, a Motion for Judgment of Acquittal was denied, and the Court imposed the judgment of sentence (App. A1) from which a direct appeal was taken to the Court of Appeals.

The judgment order of the Court of Appeals (App. 3) was issued on July 26, 1983 and is as yet unreported. The Court denied a request for rehearing by an Order dated August 18, 1983 (App. A5) which is yet unreported.

JURISDICTION

A judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals (App. A1).

The judgment of the Court of Appeals was entered, without opinion, on July 26, 1983 (App. A3). Petition for rehearing was denied on August 18, 1983 (App. A5). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1084, "Transmission of Wagering Information" provides in pertinent part:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. §1952, "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises" provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1),(2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. §1955, "Prohibition of Illegal Gambling Businesses" provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

STATEMENT

The record of this case shows that the failure of the district court to instruct properly the jury created a new Federal crime which previously did not exist. By allowing petitioner's conviction to stand, the Court of Appeals has modified Federal criminal law to permit a mere bettor to be convicted of various Federal statutes which previously proscribed only the activity of a bookmaker.[1/]

While the docket of this Court may be burdened with cases of greater national interest than this one, the unprecedented judgments of the courts below, if not reviewed by this

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1/ Petitioner was indicted with a codefendant by a Federal grand jury for Conspiracy, 18 U.S.C. §371; Transmission of Wagering Information, 18 U.S.C. §1084; and Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises, 18 U.S.C. §1952. After a jury trial, petitioner was convicted of all counts.

Court, would result in a serious injustice to petitioner who is shown by the record to be merely a self-admitted bettor.

Petitioner, David Battisti, is a professional gambler. According to undisputed testimony at trial, for nearly thirty years he has supported his wife, his son, and two handicapped daughters by what perhaps should be seen as the "second" oldest "profession" known to humankind. Defending against allegations in the indictment, petitioner candidly described his activities as a bettor, but denied he was ever a bookmaker.

The origin of this prosecution derives from petitioner's livelihood depending on his ability to win bets. Petitioner, along with Thomas DiNola, an account executive for Xerox Corporation, devised an apparently successful computerized system for placing wagers in various sporting events. This system depended

upon the compilation and evaluation of various factors, for example, the type of playing surface and previous records of the teams, on down to such details as the travel time required for players to arrive at the location of an athletic contest. Further, to enhance their chances of winning, DiNola and petitioner pooled their bets creating large sums in order to obtain the most favorable odds in wagers placed against individual bookmakers. DiNola and petitioner both testified at trial that neither were bookmakers.[2/]

The indictment charged petitioner with

2/ DiNola was a government witness. The government's expert witness, FBI Agent William Holmes, testified that bookmakers are in the business of receiving bets and paying off bets that are won. A bookmaker takes bets from both sides of a contest, thus insuring that he will obtain a profit from the "vig" charged which is a percentage the losing bettor must pay in addition to his bet. A bettor is a customer, not a bookmaker. See, United States v. Box, 530 F.2d 1258 (5th Cir. 1976)

participating in a "sports bookmaking" business or operation and, as the trial court at first recognized, the prosecution concerned only bookmaking.

At trial the contention that petitioner was involved in a bookmaking operation was supported only by argument of the prosecutor predicated on a conclusion of the expert which is unsupported by the evidence. While it became apparent that the government could not prove petitioner was a bookmaker, as set forth in the indictment, the trial court permitted it to amend and expand the theory of the prosecution allowing a conclusion that petitioner had violated the charges by mere betting activity.

While the indictment charged participation in a "sports bookmaking" operation, and one government witness, Agent Holmes, gave his conclusion that the defendant was involved in

bookmaking, the chief government witness, DiNola, testified that neither he nor the defendant were bookmakers. Thus, while there is no dispute that petitioner is a gambler, that he placed bets for himself and others, and that he shared information in order to obtain the most favorable odds against bookmakers, there is no evidence, except for the unfounded conclusion of Holmes, that petitioner was a bookmaker.

The government's amended theory of prosecution as allowed by the charge of the district court permitted the jury to find petitioner guilty even if it found merely that he was a bettor and not a bookmaker.

REASON FOR GRANTING THE PETITION

The grand jury charged petitioner with violations of 18 U.S.C. §1084, Transmission of Wagering Information and §1952, Interstate and Foreign Travel and Transportation in Aid of Racketeering Enterprises.

As a factual predicate to these violations, the grand jury specifically charged petitioner with participation in a "sports bookmaking" operation or business. This original theory of prosecution, as memorialized in the indictment and as exhibited throughout most of the government's case, was that petitioner was one of a number of coconspirators who served as office personnel of a bookmaking establishment. Because the indictment was predicated factually on the existence of a "sports bookmaking" operation or business, the government was bound to establish, as a factual prerequisite, that

petitioner was a bookmaker or that he was involved in a "sports bookmaking" operation. Petitioner maintained the defense that there was no evidence of bookmaking; he acted merely as a bettor.

Gambling, per se, is not illegal under Federal law. Neither 18 U.S.C. §1952 nor 18 U.S.C. §1955 prohibits the activity of a bettor. See, e.g., Sanabria v. United States, 437 U.S. 54 (1978) (Any degree of participation in an illegal gambling business is proscribed except for participation as a mere bettor). Thus, petitioner's admitted activity as a bettor does not subject him to criminal liability under §§ 1952 or 1955. Similarly, betting activity alone has not been held to be a violation of §1084 by the Courts of Appeals which have reviewed the question. For example, a review of gambling prosecutions under §1084 reveals that convictions have been affirmed only when the prose-

cution involved a bookmaker or a bookmaking operation. See, United States v. Sagansky, 358 F.2d 195 (1st Cir. 1966); United States v. Grezo, 566 F.2d 854 (2d Cir. 1977); United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Florea, 541 F.2d 568 (6th Cir. 1976); United States v. Stonehouse, 452 F.2d 455 (7th Cir. 1971); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979); United States v. Pezzino, 535 F.2d 483 (9th Cir. 1976).

Over and above the case law, it should be noted that the theory of prosecution admitted by the indictment was more narrow than what the statutes may be argued to proscribe. The grand jury charged and the government sought to prove that petitioner was part of a bookmaking operation, not simply a bettor. The grand jury, through the indictment, thus gave notice of the acts which it charged the statutes proscribed. See, Fed.R.Crim.Pro. 7(c)(1).

The distinction between a bettor and bookmaking was thus essential to provide to the jury. Yet, the jury was unable to determine whether the government had met its burden ofproof because it was not instructed properly by the court. While petitioner specifically requested the court to provide instruction to the jury defining "bookmakers" and "bookmaking" to enable it to distinguish such activity from that of "bettors" and "betting", the court refused the requested points for charge even though the points requested are well established in the law. See, United States v. Tomeo, 459 F.2d 445 (10th Cir. 1972).

Further, the need for these specific instructions was shown by the jury's own request for additional instructions during deliberation on the definition of what constitutes and distinguishes a bookmaker from a bettor. The refusal of the court to instruct the jury as

requested deprived the jury of the only definition possible to evaluate whether the evidence was totally lacking to prove what the indictment required.

A bookmaking business requires a means of assuring a "profit" which is derived from a percentage added to lost bets. The original and repeated instructions of the court totally lacked any mention that this essential element must be shown to satisfy the requirement of the indictment which charged participation as a bookmaker in a business.[3/]

The refusal of the court to instruct the

3/ In United States v. Box, 530 F.2d 1258 (5th Cir. 1976), Circuit Judge Goldberg presents a most exhaustive judicial review of the topic of bookmaking and betting under Federal criminal law. He concludes that a bettor, even a bettor of large sums, does not violate Federal law. The decision discloses indisputably that the Federal anti-gambling statutes were not intended to proscribe the activities of a bettor.

jury that the business of bookmaking requires some system whereby a "profit" is derived, as opposed to mere betting which is predicated on "chance"[4/] alone, aided the government in its amended theory of prosecution. While initially the government contended that it would prove, pursuant to the required factual predicate of the indictment, that petitioner acted as a "bookmaker", after the presentation of its case and the testimony of petitioner, the

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4/ By way of analogy a securities "trader" or "investor", often dealing in large sums, is an occupation which is comparable to that of a bettor. On the other hand, a securities "dealer" or "broker" is an occupation which compares to a bookmaker. The former derives a "profit" only on the "chance" occurrence that the risk taken results in a gain. The latter, on the other hand, derives an assured "profit" by charging a percentage of the sum invested. Similarly, investment clubs, associations of individuals which pool investments, do not constitute securities dealers

government amended its theory to include mere betting activity on the part of the petitioner as a "business activity" proscribed by the statutes. The jury was thus not given a proper legal foundation for exercising its duty to review the evidence in light of the indictment.

The government's amended theory of prosecution and the failure of the court to give the requested instructions permitted the jury to find petitioner guilty even if it found him to be merely a bettor.

4/ Cont'd
or brokers. Such groups are encouraged by the securities industry and are allowed under Federal law recognizing that such clubs, whatever their volumn of trading, are not individuals engaged in the business of "dealing in securities."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted:

NICHOLAS J. NASTASI
Counsel for Petitioner

OF COUNSEL:

Joseph Mellace

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. 82-00140-2

UNITED STATES OF AMERICA

v.

DAVID BATTISTI

JUDGMENT AND PROBATION/COMMITMENT ORDER

(O)n this date, November 8, 1982 ... (t)here being a verdict of guilty. Defendant has been convicted as charged of the offenses of conspiracy to transmit wager information; aiding and abetting; use of interstate facility (telephone) in aid of racketeering enterprise gambling business in violation of 18 U.S.C. §371; §1084; §2; §1952(a)(3) ... The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day plus a fine of Ten Thousand ($10,000) Dollars to be paid within 30 days under Count 1. Under Count 2, the defendant is committed to the custody of the Attorney General ... for a period of one (1) year and one (1) day to run concurrently with the sentence imposed under Count 1. Under Count 3, the imposition of a prison sentence is suspended

and the defendant is placed on probation for a period of five (5) years to run consecutively with the sentences imposed under Counts 1 and 2.

/s/ DANIEL H. HUYETT, 3rd

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
a/k/a Davey Crickett

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. No. 82-00140-2)
(Honorable Daniel H. Huyett, 3rd)

Argued July 19, 1983

Before: Adams and Higginbotham, Circuit Judges, and Teitelbaum, District Judge*

*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (I) evidence is lacking to establish a violation of 18 U.S.C. §§1084, 1952 and 1955, where the indictment charges a "sports bookmaking" operation as a factual predicate, when the evidence establishes only that the accused was a bettor; (II) the charge of the Court failed to provide a definition of "bookmaking" to enable the jury to distinguish a bookmaker from a bettor; (III) fairness is lacking when the Government capriciously refuses to allow the results of a polygraph examination to be admitted and considered at sentencing; and (IV) a prior criminal conviction of the accused was admitted improperly for impeachment where its similarity to certain evidence would cause prejudice, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST

/s/ SALLY MRVOS
Sally Mrvos, Clerk

Dated: July 26, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
Appellant

(Crim. No. 82-00140-2)

ORDER
SUR PETITION FOR REHEARING EN BANC

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Circuit Judges, and Teitelbaum, District Judge*

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* As to panel rehearing only

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: August 18, 1983

Office-Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-636

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DAVID BATTISTI,

Petitioner

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. 82-00140-2

UNITED STATES OF AMERICA

v.

DAVID BATTISTI

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(O)n this date, November 8, 1982 ... (t)here being a verdict of guilty. Defendant has been convicted as charged of the offenses of conspiracy to transmit wager information; aiding and abetting; use of interstate facility (telephone) in aid of racketeering enterprise gambling business in violation of 18 U.S.C. §371; §1084; §2; §1952(a)(3) ... The defendant is hereby committed to the custody of the Attorney

General or his authorized representative for imprisonment for a period of one (1) year and one (1) day plus a fine of Ten Thousand ($10,000) Dollars to be paid within 30 days under Count 1. Under Count 2, the defendant is committed to the custody of the Attorney General ... for a period of one (1) year and one (1) day to run concurrently with the sentence imposed under Count 1. Under Count 3, the imposition of a prison sentence is suspended and the defendant is placed on probation for a period of five (5) years to run consecutively with the sentences imposed under Counts 1 and 2.

/s/ DANIEL H. HUYETT, 3rd
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
a/k/a Davey Crickett

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. No. 82-00140-2)
(Honorable Daniel H. Huyett, 3rd)

Argued July 19, 1983

Before: Adams and Higginbotham, Circuit Judges, and Teitelbaum, District Judge*

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ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST

/s/ SALLY MRVOS
Sally Mrvos, Clerk

Dated: July 26, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1756

UNITED STATES OF AMERICA

v.

DAVID BATTISTI,
Appellant

(Crim. No. 82-00140-2)

ORDER
SUR PETITION FOR REHEARING EN BANC

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Circuit Judges, and Teitelbaum, District Judge*

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* As to panel rehearing only

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: August 18, 1983

Office - Supreme Court, U.S.
FILED
NOV 25 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-476 and 83-636

In the Supreme Court of the United States

OCTOBER TERM, 1983

DOMINIC IAVARONE, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID BATTISTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that a "mere bettor" cannot violate 18 U.S.C. 1084.

2. Whether the district court erred in declining to emphasize the differences between "bettors" and "bookmakers" in connection with its instructions defining "engaged in the business of betting or wagering" within the meaning of 18 U.S.C. 1084 and conducting an "illegal gambling business" within the meaning of 18 U.S.C. 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-476

DOMINIC IAVARONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-636

DAVID BATTISTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A3)[1] is not reported.

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[1] "Pet. App." refers to the appendix to the petition in *Dominic Iavarone* v. *United States*, No. 83-476. "Supp. App." refers to the supplemental appendix to the petition in *David Battisti* v. *United States*, No. 83-636. "C.A. App." refers to the joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2-A3) was entered on July 26, 1983. A petition for rehearing filed by petitioner Battisti (Supp. App. A6-A7) was denied on August 18, 1983. The petition for a writ of certiorari in No. 83-476 was filed on September 20, 1983, and the petition for a writ of certiorari in No. 83-636 was filed on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of conspiracy to transmit wagering information by interstate wire, in violation of 18 U.S.C. 371 (Count 1); transmitting wagering information by interstate wire, in violation of 18 U.S.C. 1084 and 2 (Count 2); and use of an interstate facility to carry on an illegal gambling business, in violation of 18 U.S.C. 1952(a)(3) and 1955. Petitioners Iavarone and Battisti were sentenced as follows: on Count 1, five years' imprisonment and a $5000 fine (Iavarone) and one year's imprisonment and $10,000 fine (Battisti) on Count 2, concurrent terms of two years (Iavarone) and one year and one day (Battisti); on Count 3, both received five-year terms of probation to follow their prison sentences. The court of appeals affirmed by judgment order (Pet. App. A1-A3).

1. The evidence at trial showed that between February and June 1978, petitioners were participants in a sports betting operation in Bristol, Pennsylvania (C.A. App. 260a-261a). Petitioners took bets involving substantial sums from Thomas DiNola. During the 1978 baseball season, DiNola called petitioners' operation as often as two or three times a day and placed bets of $1000 to $3000 per game (*id.* at

249a). In addition to placing bets with petitioners' organization, DiNola received "layoff" bets from petitioners' operation (*id.* at 519a-520a), *i.e.*, bets made to adjust the volume of wagers a bookmaker is carrying on each side of a particular contest (see C.A. App. 525a). DiNola also relied on petitioners' organization to provide him with "line information," *i.e.*, the point spreads between teams for a particular game (*id.* at 518a-521a).

On June 5, 1978, the Federal Bureau of Investigation conducted a warrant-authorized search of petitioners' headquarters in Bristol. The office was protected by three locked doors (C.A. App. 443a). In the room that housed the gambling operation, agents discovered petitioners and four other men, twelve telephones, three radios and two television sets (C.A. App. 403a-404a, 430a-431a). The agents also found a fire burning and some partially burned gambling records in a trash can (C.A. App. 403a, 430a, 436a-437a). While the agents were present, telephones in the room rang repeatedly (C.A. App. 423a); when the agents answered the phones, the callers did not respond (*ibid.*).

An FBI special agent, who was qualified as an expert witness on bookmaking, sports betting and gambling matters (C.A. App. 510a), testified that based on the records and tape-recorded conversations in the case, it was his conclusion that petitioner Iavarone was a manager or partner in the Bristol gambling operation and that petitioner Battisti was a "phone man" at the operations headquarters (*id.* at 515a). The agent concluded that neither was a mere bettor and explained that mere bettors would not use twelve telephones, would not disseminate line information and would not have "customers" (*id.* at 572a).

Evidence from wiretap interceptions depicted petitioner Iavarone's managerial role. On May 3, 1978, petitioner Iavarone called Caesar Pesarini, who was at the headquarters, gave Pesarini a number where petitioner could be

reached and checked on the progress of the betting (C.A. App. 112a). The expert's characterization of Battisti as a "phone man" was fully supported by a taped conversation of June 2, 1978, in which petitioner Battisti accepted a series of bets in a phone conversation with Thomas Strong (*id.* at 124a-130a).

The district court charged the jury that with respect to 18 U.S.C. 1084, it must be shown that petitioners were "engaged in a regular course of conduct or series of transactions involving time, attention and labor devoted to betting or wagering for profit rather than casual or isolated transactions" (C.A. App. 757a). The court explained that a bookmaker "is but just one example of a person who is 'engaged in the business of betting or wagering.' " The court added that bookmakers "take bets; they receive them; and they handle or service those bets. Bookmakers have customers; they distribute information; and they lay off bets" (*id.* at 758a).

With respect to 18 U.S.C. 1955, the court instructed that the term "gambling," as used in the statute, includes, but is not limited to, bookmaking (C.A. App. 761a). After explaining the elements of the offense, the court charged that a "mere bettor or customer of a gambling business may not properly be said to conduct the business" (*id.* at 764a).

The court of appeals affirmed by judgment order, merely reciting the issues presented by petitioners (Pet. App. A2-A3).

ARGUMENT

1. Petitioners contend (83-476 Pet. 10-15; 83-636 Pet. 15-16) that the district court's jury instructions were erroneous because the district court failed to instruct the jury expressly that "bettors" cannot violate 18 U.S.C. 1084,

which prohibits the interstate transmission of bets or wagers by one who is engaged in the business of betting or wagering. This contention is without merit.

No court of appeals has ever overturned a conviction under 18 U.S.C. 1084, on the ground that the defendant was only a bettor. Instead, the courts have consistently concluded that "[i]f a defendant is professionally engaged in making bets and wagers," then he is within the reach of Section 1084. *Sagansky* v. *United States*, 358 F.2d 195, 201 (1st Cir. 1966). See also *United States* v. *Sellers*, 483 F.2d 37, 45 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974) ("[W]e conclude that the statute properly construed reaches the activities of these professional gamblers who, as the jury found, conducted their activities through the use of interstate telephone facilities * * *"); *United States* v. *Stonehouse*, 452 F.2d 455, 456 (7th Cir. 1971) ("the activity of a professional gambler * * * is prohibited by § 1084(a) * * *"); *United States* v. *Anderson*, 542 F.2d 428, 436 (7th Cir. 1976); *Truchinski* v. *United States*, 393 F.2d 627, 629 (8th Cir. 1968), cert. denied, 393 U.S. 831 (1969).[2]

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[2]The legislative history of Section 1084 supports this construction, making it clear that the statute reaches professional gamblers as well as bookmakers. In his letter recommending the legislation, the Attorney General noted that law enforcement "is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances." However, he added, the bill was intended to reach "professional gamblers" even if they claim, "I just like to bet. I just make social wagers." S. Rep. 588, 87th Cong., 1st Sess. 3 (1961). The Senate Report noted that the statute was designed to reach the individual users of interstate wire facilities who are "engaged in the business of betting or wagering," and to "close another avenue utilized by *gamblers* for the conduct of their business." (*Id.* at 2) (emphasis added). Likewise, the House Report noted that the statute was designed to assist the states in the enforcement of "their laws pertaining to *gambling*, bookmaking, and like offenses" (H.R. Rep. 967, 87th Cong., 1st Sess. 1 (1961) (emphasis added). See also 107 Cong. Rec. 16535 (1961) (remarks of Rep. McCulloch).

Thus, the issue is not, as petitioners suggest, whether they were "bettors" or "bookmakers," but rather whether they were engaged in the business of betting or wagering.[3] On that issue, the district court's instruction was clearly correct. The court made plain to the jury that the government was required to prove beyond a reasonable doubt that petitioners were "engaged in a regular course of conduct or series of transactions involving time, attention and labor devoted to betting or wagering for profit rather than casual or isolated transactions" (C.A. App. 757a). That instruction correctly defined for the jury the term "engaged in the business of betting or wagering" within the meaning of Section 1084.[4] Indeed, it even specified bookmaking as one possible way of violating the statute. Since the instruction embodies a correct interpretation of Section 1084 and the decision below upholding it conflicts with no decision of this Court or any court of appeals, further review is unwarranted.

2. Petitioners argue (83-476 Pet. 18-19; 83-636 Pet. 15-16) that the error in not defining the difference between bettors and bookmakers was highlighted by the jury's

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[3]Nor is there any merit to petitioner Battisti's assertion (83-636 Pet. 14) that the indictment charged a crime more narrowly than 18 U.S.C. 1084 provides. While the indictment does refer to a " 'sports bookmaking' business," (C.A. App. 87a) it repeatedly charges petitioners with accepting wagers and bets as part of their business of betting and wagering (C.A. App. 86a-89a). Thus, the government was not limited by the indictment to proving that petitioners were "bookmakers."

[4]Petitioners characterize (83-476 Pet. 5; 83-636 Pet. 8) themselves as mere customers of a bookmaker, but this assessment ignores the compelling evidence that they were engaged in the business of wagering and betting. When arrested they had 12 telephones in their office. During the gambling operation, there was evidence that petitioners quoted odds, had customers, and placed layoff bets. Thus, there was ample evidence from which a factfinder could have inferred that they were "bookmakers." *A fortiori*, there was sufficient evidence to prove that petitioners were engaged in the business of wagering or betting within the meaning of 18 U.S.C. 1084.

request for "the definition of a bookmaker and a bettor" (C.A. App. 796a). But the court responded properly to that request.

After discussing the question with counsel, the court proposed to repeat the definition of "bookmaker" that had been given in the initial charge. As to the term "bettor," the court proposed to tell the jury that a bettor is simply a person who places a bet, and that the jury should use its common sense in applying the term. Petitioners' counsel agreed that that instruction was acceptable (C.A. App. 804a). After further discussion, the court once again outlined its proposed charge and added, "I take it, now Mr. Nastasi and Mr. Simone [counsel for petitioners], you are satisfied with this approach" (*id.* at 806a). Neither counsel voiced any objection.

The court then recalled the jury and instructed it as follows (*id.* at 807a):

> [I]n reply to [your] note, may I tell you that you will recall from my charge that I told you that bookmakers take bets, they receive them, and they handle or service these bets. Bookmakers have customers, they distribute line information and they lay off bets. I would ask that you use your ordinary common sense to determine the meaning of the word "bettor." I might say that one common sense definition of the meaning of the word is simply that a bettor is a person who places a bet.

The court then advised the jurors that if they wanted a fuller discussion of the point, the court would read the charge on Counts 2 and 3, and explain the essential elements of the statutes involved in those counts. The jury expressed no desire for a more complete instruction (*id.* at 807a-808a). Following the delivery of the supplemental instruction, neither defense counsel voiced any objection (*ibid.*). Accordingly, the court's instruction in response to

the jury's request was not only consistent with other court authority in defining a bookmaker, see *United States* v. *Scavo*, 593 F.2d 837 (8th Cir. 1979); *United States* v. *Tomeo*, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914 (1972), but also was at the time satisfactory to petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

DOJ-1983-11